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HAROLD B. WILLEY, C

In The
Supreme Court Of The United States
OCTOBER TERM, 1954

No. — 409

JOSEPH KENT HARRISON, JR.
Petitioner

versus

MARTHA HARRISON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Joseph Kent Harrison, Jr., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the Eastern District of Virginia, Norfolk Division.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia is printed in the record (R.—). The opinion of the Court of Appeals is reported in—— F. (2d)—.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is invoked under 28 U.S.C., Sec. 1254(1). The judgment of the Court of Appeals sought to be reviewed was entered July 19, 1954.

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Whether or not a Federal Court may enter into the field of domestic relations and award a decree for the future payments of alimony; and,

2. Whether or not a Federal Court may further enter into the field of domestic relations and punish for contempt in a matter involving future payments of alimony.

STATEMENT OF THE MATTER INVOLVED

Martha Harrison filed a civil action in the United States District Court for the Eastern District of Virginia against Joseph Kent Harrison, Jr., in which she sought to declare a Mexican divorce obtained by the defendant, Joseph Kent Harrison, Jr., void. She further asked the court to adopt an Ohio decree of divorce between the parties for alimony and support money and to have the defendant pay both the past-due monies, and monies accruing in the future for

alimony and support, and to enforce payment by attachment for contempt.

The defendant promptly filed a motion to dismiss on the grounds of lack of jurisdiction in that the Constitution did not permit the Federal Courts to go into domestic matters, the same having been allocated and left entirely to the state courts ever since the establishment of these United States. The District Court overruled the motion to dismiss and required the defendant to file an answer, which answer was filed by the defendant. The defendant also filed a motion for summary judgment for the grounds stated—the lack of jurisdiction. Likewise, the plaintiff filed a motion for summary judgment. Upon hearing all of the evidence taken in discovery and the pleadings, the District Court granted the plaintiff all of the relief sought for and held that the plaintiff was entitled to:

1. A money judgment for the arrearage;

2. Adopting the divorce decree in its entirety for future payments of alimony and support; and,

3. That the District Court would enforce the same by contempt.

Upon appeal, the United States Court of Appeals for the Fourth Circuit affirmed, although stating in their opinion: *"IT IS CLEAR THAT THERE IS HERE A REAL CONFLICT IN THE DECIDED CASES."* (Italics and capital letters ours.)

Martha Harrison, the plaintiff, is a citizen of the State of Ohio. Joseph Kent Harrison, Jr., is a citizen of the State of Virginia. The parties were married at Middletown, Ohio, on September 11, 1937. They lived together in Shaker Heights, a residential suburb of Cleveland, until early 1951, at which time domestic troubles arose and the plaintiff filed

for a divorce against the defendant in the Court of Common Pleas of Cuyahoga County, in the State of Ohio. Personal service was had upon the defendant and a stipulation was entered calling for temporary alimony and support money.

The defendant, to avoid further domestic difficulties, obtained a position in Norfolk, Virginia, at which time the divorce proceeding was not concluded in Ohio.

Although the plaintiff had instituted action in Ohio, she saw fit to hold the matter in abeyance, and thereafter the defendant, whose people had been originally in business in Mexico and had resided there, moved to Mexico. After arriving in Mexico, the defendant instituted divorce proceedings in the sister republic of Mexico and gave personal notice to the plaintiff of the institution of his divorce proceeding. Notwithstanding the notice of the pendency of his divorce suit and that he had established a residence and domicile in the sister republic of Mexico, the defendant did not appear, and on the 10th day of December, 1951, the defendant was awarded a decree of divorce a vinculo matrimonii by the First Civil Court, Bravos District, City of Juarez, State of Chihuahua, Republic of Mexico. After the defendant obtained his divorce a vinculo matrimonii, and after full notice of the same, the plaintiff then proceeded without any further notice to the defendant and obtained a final decree of divorce a vinculo matrimonii, and prevailed upon that court, notwithstanding the stipulation that had heretofore been entered into to have the court award her a lump-sum judgment of Ten Thousand ($10,000.00) Dollars as alimony and for support of a minor child, and for this amount a judgment was entered in behalf of the plaintiff against the defendant. In addition, notwithstanding the decree of stipulation, which provided for Two Hundred Fifty ($250.00) Dollars in bi-monthly installments for the

support of the plaintiff and minor child, and the lump-sum of Two Hundred ($200.00) Dollars in cash, the plaintiff prevailed upon the Trial Judge of the County of Cuyahoga, State of Ohio, to further provide the following:

> "That until the further order of the court, and commencing as of November 1, 1952, defendant pay to plaintiff as alimony the sum of $200.00 per month, plus $200.00 per month for the care and support, during his minority, of said minor child of the parties; that as to each such monthly payment the Court expressly denies to itself any reservation of the power to recall or modify any such payment after the same shall have become due and payable in accordance herewith.***"

Upon the hearing by the District Judge, he entered the judgment not only for the sum of Ten Thousand ($10,000.00) Dollars, but for the additional sum of Three Thousand Four Hundred ($3,400.00) Dollars for arrearage of alimony and support money and the payment of the total of Four Hundred ($400.00) Dollars per month for the support of the plaintiff and their infant child, and that in default of payment, the District Court would enforce it by contempt.

The record shows that the defendant has continued to send Two Hundred ($200.00) Dollars per month, which constitutes almost fifty (50%) percent of his entire income, excluding the deduction for income tax to the Federal Government and State Government.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

1. To permit the judgment of the United States Court of

Appeals for the Fourth Circuit is to set aside the well-established law laid down by the Supreme Court of the United States since the matter was firstly before it in the year 1858 in the decision of *Barber* v. *Barber,* 21 How. ((62 U.S.) 582, 592).

2. Not only is this decision in conflict with *Barber* v. *Barber,* 21 How. ((62 U.S.) 582, 592, (1858), it is also contrary to *Sistare* v. *Sistare,* 218 U.S. (1) S.Ct. 682, 54 L. Ed. 905, 28 L.R.A. (N.S.), (1909), and contrary to *ex rel. Popovici, Vice-Counsul, Rumania,* v. *Agler,* et al, 280 U.S. 379 (1930). It is also in conflict with every other decision of the Circuit Court of Appeals, and particularly in conflict with the Circuit Court of Appeals for the District of Columbia in *Davis* v. *Davis,* 29 App. D.C. 258, 9 L.R.A. (N.S.), 1071, (1907); *Grant* v. *Grant,* 64 App. D.C. 146, 75 F. 2d. 665, (1935), and appropriately against the latest decision of the United States Supreme Court in which a writ of certiorari was denied—the case of *Worsley* v. *Worsley,* 64 App. D.C. 202, 76 F. 2d. 815, (1935).

3. The decision is of momentous import to the bench, bar, and law schools throughout the United States concerning the delegation of domestic relations to the Federal Courts.

Wherefore, petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Fourth Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record below, and that the decision of such Court of Appeals be reversed and that the petitioner shall have such other and further relief as may be just.

LOUIS B. FINE
Counsel

BRIEF IN SUPPORT OF PETITION

I. Whether or not a Federal Court may enter into the field of domestic relations and award a decree for the future payments of alimony.

As to monies that might accrue in the future, based on an award of future alimony by installments, the Federal Courts have unanimously and without a dissent by any judge at any time in the history of Federal jurisprudence refused to enforce such award under the full faith and credit clause.

The following are unanimous in the proposition of law hereinabove cited:

In *Barber* v. *Barber,* 21 How. ((62 U.S.) 582, 592), (1858), a wife obtained a divorce from her husband in New York, and sought to enforce the same in the Federal District Court in Wisconsin. Under the decree in New York she had been awarded permanent alimony which was to accrue in the future. The Court allowed the wife a judgment for the backdue alimony which was enforceable by execution. The Court clearly pointed out that its jurisdiction was limited, as is clearly illustrated by its statement in 62 U. S. 591, 21 How. 591:

> ". . . The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony. (*Shaftoe* v. *Shaftoe, 7* Vesey, 171; *Dawson* v. *Dawson, 7* Ves., 173; *Haffey* v. *Haffey,* 14 Ves., 261; *Angier* v. *Angier,* Pre. Ch., 497; Cooper's Eq. P., ch. 3 pp. 149, 150; *Coglan* v. *Coglan,* 1 Ves., p. 194; *Street* v. *Street,* 1 Turn. and Tapel, 322.)"

This language unmistakably propounds the rule which has been followed since that early date to the effect that the Federal Courts will not entertain any judgment which seeks to enforce future payments of alimony.

Again, Mr. Justice White, speaking for the Supreme Court of the United States, in *Sistare* v. *Sistare,* 218 U.S. (1) S.Ct. 682, 54 L.Ed. 905, 28 L.R.A. (N.S.), 1068, (1909), stated:

> "... First, that generally speaking, where a decree is rendered for alimony and is made payable in future installments the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber* case, 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' "

Thus, in the above case, installments must be "absolute and vested", even though the decree might be modified prospectively by future orders of the Court to come within the purview of the full faith and credit clause.

The Court in the case at bar entered a judgment dealing with future ailmony, the pertinent part of which is as follows:

> "That until further order of this Court, and commencing as of March 1, 1954, defendant pay to the plaintiff as alimony the sum of Two Hundred ($200.-00) Dollars per month, plus Two Hundred ($200.00) Dollars per month for the care and support during his

minority of said minor child of the parties; and that, as to each such monthly payment, execution may issue thereon as soon as each payment shall become due and payable.

". . . That this Court will not entertain any application in the future for modification of any payment, nor in any way adjudicate its justice, leaving any change in the original decree as to future payments to the said Court of Common Pleas of Cuyahoga County, Ohio, such change to be thereafter adopted by this Court."

With regard the adoption of future payments and future alimony, the court below erred in that the Federal Courts are without jurisdiction to do so if the authorities hereinabove cited are the law as laid down by the United States Supreme Court. No Federal Court at any place in the United States at any time heretofore has ever awarded future alimony by adopting a decree of a state court. It has been and it is the law of the Federal judiciary that Federal Courts will not only decline to hear any matter involving domestic relations, and it has been so concluded that no attempt has ever been made in almost the last one hundred years. This field of jurisdiction is similar to the other field of jurisdiction, to-wit: the administration of estates which have been left entirely to the states.

That this is not a final judgment which the Federal Courts would award under the full faith and credit clause of the Constitution is significant, in that the decree of the Ohio court restricts itself as to modification only regarding such installments of future alimony as "shall become due and payable". It is clear that the law of Ohio allows modification as to future alimony and support where a child is concerned. *Van Almsick* v. *Van Almsick,* 69 Ohio App. 425, 42 N.E.

2d. 228, (1941). This last cited case stands for the proposition that orders for future alimony and support money payments in installments are in the same category, and unless otherwise provided in the judgment entries are both subject to modification by the Court, making the orders for good cause shown.

In view of the uncertainty as to possible modification of the future awards of alimony and as to its accrual, even the state courts have been indeed reluctant to press into service principles of comity in order to localize the foreign decree and thus enforce future payments. *Lape* v. *Miller,* 203 Ky. 742, 263, S.W. 22, (1924). *Cureton* vs. *Cureton,* 132 Ga. 745, 65 S.E. 65, (1909).

The case of *Levine* v. *Levine,* 95 Ore. 94, 187 P. 609 (1920) illustrates the reasoning of the state courts, which refuse to adhere to the enforcement of a foreign decree for future alimony. In that case, the court said:

> "Precedents involving attempts to enforce in one state decrees for alimony rendered in another state may be divided into three classes: (1) Those dealing with awards payable presently, and this class includes not only those cases where a gross sum is made payable contemporaneously with the rendition of the divorce decree, but also those where installments have accrued on a decree providing for the future payment of alimony in installments, and upon the petition of either party there is a finding that the arrears amount to a specified sum and an adjudication that such specified sum is payable presently; (2) those treating of accrued installments which have not yet been merged into a readjudication; and, (3) these relating to installments which have not yet become due. Adjudications belonging to the third class may be ignored, since all agree that a decree rendered in one state cannot be enforced in

a sister state, as to installments not yet due, for two reasons: (a) No money is yet due; (b) it is generally, if not universally, understood that an allowance is subject to modification before accrual.

". . . If, however, a part of the Minnesota decree is not final, but is subject to modification by the Court which rendered it, then neither the United States Constitution nor the principle of comity compels the courts of this state to enforce that part of the decree, for no court other than the one granting the original decree could undertake to administer relief without bringing about a conflict of authority."

The state courts have, since their existence, through their equity powers, dealt with the question of divorce and alimony, but the Federal Courts have uniformly declined any jurisdiction over divorce and alimony or any incident thereto in clear terms. It cannot be denied that the awarding of alimony and support of children has always made up intricate parts of the field of domestic relations.

In *Barber* v. *Barber*, 21 How. ((62 U.S.) 582, 592), (1858) the Supreme Court disclaimed jurisdiction over domestic matters for the Federal Courts. This decision has remained in force and effect for nearly a century, never having been overruled. One page 584 we find this pertinent observation by Mr. Justice Wayne:

"We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo, or to one from bed and board."

In 1890 the Supreme Court considered a case in which the issue was, whether or not a Federal District Court had the

authority in law to issue a writ of habeas corpus to restore an infant to the custody of its father, when the infant was unlawfully detained by its grandparents. The Court held that the relationship of father and child was one which involved domestic relations and was not cognizable by the Federal Courts. The Court said *In re Burrus,* 136 U.S. 586, (1890) at page 593:

> "In the case before us there was no pretence that the child was restrained of its liberty, or that the grandfather withheld it from the possession and control of the father, under or by virtue of any authority of the United States, or that his possession of the child was in violation of the Constitution or any law or treaty of the United States. The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of Congress, or any treaty of the United States or its Constitution."

And again at page 596:

> "We have already said that the relations of the father and child are not matters governed by the laws of the United States, and that the writ of habeas corpus is not to be used by the judges or justices or courts of the United States except in cases where it is appropriate to their jurisdiction."

The question of jurisdiction over the subject of divorce and allowance for alimony was discussed in *De La Rama* v. *De La Rama*, 201 U.S. 303, (1905) at page 307, by Mr. Justice Brown, who delivered the opinion of the Court. In that case Mr. Justice Brown indicated that the reason for the long-established rule that the United States Courts have no jurisdiction upon the subject of divorce or for the allowance of alimony was that there was no diversity of citizenship, and that the marriage relationship and a suit for divorce does not involve anything of pecuniary value.

In the case of *Popovici* v. *Popovici*, 30 Fed. 2d 185, (1927), the wife, an American citizen, attempted to sue John C. Popovici, a subject of the King of Rumania, and a Rumanian consul, for a divorce in the Federal District Court for the Northern District of Ohio, claiming that the Federal Court had jurisdiction under Article Three, Section Two, of the Constitution of the United States, and of Sections Twenty-four and Two Hundred and Fifty-six (28 U.S.C.A. Sections 41, 371) which sections involve giving the District Courts original jurisdiction in all suits against consuls and vice-consuls. District Judge Jones, in the decision in that case, discussed the *Barber* case previously cited as authority for the proposition that the Federal Court did not have jurisdiction, and then pointed out at page 185:

> "In the case of *In re Burrus*, 136 U.S. 586, 10 S. Ct. 850, 34 L. Ed. 1500, the court announced, through Mr. Justice Miller, that: 'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' To the same effect is *Simms* v. *Simms*, 175 U.S. 162, at page 167, 20 S. Ct. 58, 60 (44 L. Ed. 115), and *De La Rama* v. *De La Rama*, 201 U.S. 303, 307, 26 S. Ct. 485 (50 L. Ed. 765)."

Following this decision, the wife then filed for a divorce in the Court of Common Pleas in Ohio and the husband attempted to obtain a writ of prohibition from the Supreme Court of Ohio restraining the proceeding, which writ was refused, whereupon the United States Supreme Court granted certiorari and reviewed over the matter.

In the case of *ex rel. Popovici, Vice-Consul, Rumanina,* v. *Alger, et al,* 280 U.S. 379 (1930) Mr. Justice Holmes wrote the decision of the Court which held that the Supreme Court of the United States would follow its previous decisions with regard to the subject of domestic relations, husband and wife, parent and child, and accordingly ruled that the state courts were the proper forum for the divorce against the vice-consul and that they had jurisdiction to proceed with the matter, despite the provision of the Judicial Code that provided that all suits and proceedings against ambassadors or other public ministers or their domestics or domestic servants, or against consuls of vice-consuls, the jurisdiction shall be in the Courts of the United States.

At page 838, Justice Holmes said:

> ". . . It has been understood that, 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States,' Ex parte Burrus, 136 U.S. 586, 593, 594, and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied. *Barber* v. *Barber,* 21 How. 582. *Simms* v. *Simms,* 175 U.S. 162, 167. *De La Rama* v. *De La Rama,* 201 U.S. 303, 307. A suit for divorce between the present parties brought in the District Court of the United States was dismissed. *Popovici* v. *Popovici,* 30 Fed. (2d) 185.

"The words quoted from the Constitution do not of themselves and without more exclude the jurisdiction of the State. *Plaquemines Tropical Fruit Co.* v. *Henderson*, 170 U.S. 511. The statutes do not purport to exclude the State Courts from jurisdiction except where they grant it to the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce. If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. "Suits against consuls and vice-consuls" must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts."

Mr. Justice Holmes then gives us the theory of why the Federal Courts have uniformly refused to take jurisdiction in domestic matters, and this is that the whole field of domestic relations was a field which was reserved by the states for state courts. (Italics ours.) The Federal Courts are, of course, courts of limited jurisdiction and granted only those rights as prescribed by the constitution. In the recent case of *Linscott* v. *Linscott,* 98 F. Supp. 802, (1951), the husband sought in the United States District Court for the Southern District of Ohio to have a separation agreement revoked, which agreement involved a sum in excess of Three Thousand ($3,000.00) Dollars, and in which case there was the requisite diversity of citizenship. The Court, however, in an opinion written by District Judge Riley, declined jurisdiction on the ground that such an agreement involved domestic relations, a subject over which

the Federal Courts had no jurisdiction, despite the fact that there was the requisite jurisdictional amount, and despite the fact that there was the requisite diversity of citizenship.

The Court said at page 804:

> "Nevertheless, the court lacks jurisdiction of this controversy because in our opinion it involves the domestic relations of the parties. The rule is tersely stated in *State of Ohio ex rel. Popovici* v. *Agler,* 280 U.S. 379, 383, 50 S. Ct. 154, 155, 74 L. Ed. 489. (Citing above case)"

In view of the foregoing, it was error for the District Court to allow an award of future alimony by the adoption of the state court's decree. This decree clearly registers an entry into the field of domestic relations. To allow this decree to stand would open the door to endless litigation between disgruntled husbands and wives, and make a monthly collection agency out of the Federal District Courts.

Another consideration is that while on the one hand the Court here makes the Ohio decree its decree for enforcement, it closes the door to any relief in the future for the defendant, forcing him to return to Ohio. Certainly a state court which has taken jurisdiction of future alimony would allow modification of its own decree if the financial situation of the defendant is such that an injustice is being worked against him.

II. Whether or not a Federal Court may further enter into the field of domestic relations and punish for contempt in a matter involving future payments of alimony.

In the adoption of the judgment of the trial court, the

trial judge in effect held that if the alimony payments in the future were not made, it would exercise its contempt proceedings. This in effect means that the Federal Courts will hereafter deal with matters of alimony and become an ancillary collection court as prohibited by the United States Constitution for patrons of what is popularly known as the "alimony club". It is respectfully submitted to this august court that the framers of our Federal Constitution never intended the Federal Courts to have the power to intervene in a matter between husband and wife concerning support of a wife or child.

For authority on this proposition, which is unanimous throughout the land so far as the Federal judiciary is concerned, the attention of the court is invited to that learned court, the Circuit Court of Appeals of the District of Columbia, which has consistently held that alimony is not a matter for contempt where a decree of a foreign state is involved. They have held that the Federal judiciary can only permit the entry of a judgment on which an execution may issue for the arrearage of alimony. The case of *Davis* v. *Davis,* 29 App. D.C. 258, 9 L.R.A. (N.S.), 1071, (1907), is the leading case in the District of Columbia, and this rule has been reiterated in *Grant* v. *Grant,* 64 App. D.C. 146, 75 F. 2d. 665, (1935), and *Worsley* v. *Worsley,* 64 App. D.C. 202, 76 F. 2d. 815, (1935), (Certiorari denied.). The Courts of New Jersey, in *Bennett* v. *Bennett,* 63 N.J. Eq. 306, 49 A. 501, (1901), and *Kossower* v. *Kossower,* N.J. Err. & App. 142 A. 30, (1928), held that the remedy at law was complete.

In *Weidman* v. *Weidman,* 274 Mass. 118, 174 N.E. 206, (1931), where a wife attempted to sue in equity for back-due alimony in accordance with an award made by a New York court, the Massachusetts Supreme Court said:

> "No subject of equity jurisdiction is set forth in the bill. No ground for relief peculiar to equity as distinguished from law is alleged in the pleadings. The design of the bill is to collect the sum of money established as due to the plaintiff by the judgment of the New York court and nothing more. The ordinary means for collecting a judgment debt is by action at law. There can be no resort to equity to that end save where special equitable relief, such as a creditor's bill, is sought outside bald collection. *Rioux* v. *Cronin,* 222 Mass. 131, 137, 139, 109 N.E. 898. A complete and adequate remedy is afforded by an action at law."

Also see *Page* v. *Page,* 189 Mass. 85, 75 N.E. 92, 4 Ann. Cas. 296, (1905).

In the *Barber* case (supra), which has been the leading case since 1858, on the subject of enforcement of an alimony award under a decree of a foreign court, the decree of the foreign court called for the issuance of an execution when the alimony became due and was not paid. (Pages 585 and 587). This case, of course, indicates that equity should enforce the judgment and the manner in which it should be enforced is by execution. At no point in this case is it indicated that a collection of this debt should be enforced by the attachment of the person of the defendant. The above case has never been overruled in this regard, nor seriously questioned, until the decision of the Fourth Circuit in the case at bar. The power to enforce a decree for permanent alimony by attachment for contempt belongs inherently to a court having jurisdiction of divorce suits. It is clear that the Federal Courts do not have inherent jurisdiction of divorce suits or alimony matters, but consider them merely from the standpoint of a debt which has become due and

involves a matter of over Three Thousand ($3,000.00) Dollars. There is a complete, full and adequate remedy at law which is available for the enforcement of any judgment which is entered by a Federal Court on past-due alimony.

CONCLUSION

The writ of certiorari should be grant because of the novelty of the question and the effect on the jurisprudence of Federal procedure at this time and in the future for the bench, bar, and the universities.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 6794.

JOSEPH KENT HARRISON, JR.,
Appellant,

versus

MARTHA HARRISON,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

(Argued June 14, 1954. Decided July 19, 1954.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Robert C. Stackhouse and Howard I. Legum (Louis B. Fine on brief) for Appellant; and William C. Worthington (Worthington & White on brief) for Appellee.

DOBIE, Circuit Judge:

Martha Harrison filed a civil action in the United States District Court for the Eastern District of Virginia against Joseph Kent Harrison, Jr., in which she sought to declare a Mexican divorce obtained by the defendant, Joseph Kent Harrison, Jr., void. She further asked the court to adopt an Ohio decree of divorce between the parties as to alimony and support money as a judgment of the District Court, and sought to require, by a judgment of the District Court, the defendant to pay both the past-due monies and monies accruing in the future for alimony and support, with power to enforce payment by attachment for contempt.

The District Court denied the defendant's motion to dismiss and ordered the defendant to file his answer. The defendant filed an answer, which was followed by motions for summary judgment filed both by the plaintiff and the defendant, and the defendant's answer to the plaintiff's motion to dismiss. The District Court granted to the plaintiff the relief sought in the complaint, and defendant has appealed to us.

Martha Harrison and Joseph Kent Harrison, Jr., were married in Middletown, Ohio, on September 11, 1937. Thereafter, they lived together in Shaker Heights, a suburb of Cleveland, Ohio. One child, a boy named Joseph Kent Harrison, III, was born of the marriage. He is now fourteen years old and his custody has been awarded to his mother by the Ohio divorce court.

In January, 1951, Joseph's growing domestic difficulties with Martha came to a head. She instituted, in the Court of Common Pleas of Cuyahoga County, Ohio, a divorce suit against him, in which he was personally served with process, retained a lawyer to represent him, made a temporary

alimony and support money agreement and he appeared by counsel in the divorce suit in connection with the filing of this agreement.

Soon thereafter, Joseph gave up his job in Cleveland which carried an annual salary of $9,200.00 and went to work in Norfolk, Virginia, with an annual salary of $6,-000.00, for a company of which Marjorie Burton was an officer and the majority stockholder. He took this substantial cut in salary despite the fact that he had experienced considerable trouble supporting his wife and child on his salary in Cleveland. Apparently, Joseph and Marjorie were frequently together and became close friends. In the meanwhile, Joseph had tried, without success, to have the divorce proceeding go through to a final disposition. The wife, it seems, had several times had the case continued.

In early November, 1951, Joseph, on full pay from his Norfolk employer, left Norfolk for Mexico, where Marjorie joined him in less than two weeks. He stayed in Mexico about six weeks. On December 10, 1951, Joseph, without personal service on Martha, obtained a divorce decree from Martha, in the First Civil Court, Bravos District, State of Chihuahua, Republic of Mexico. About three days later, Joseph and Marjorie went through a marriage ceremony in Mexico. Very shortly thereafter, he returned to Norfolk.

During the events described in the preceding paragraph, the Ohio divorce suit had been pending unadjudicated. Thereafter, Martha went ahead with the Ohio divorce and was awarded a decree of divorce in her favor wherein Joseph was found "guilty of gross neglect of duty and extreme cruelty towards plaintiff." The decree also contained the following order:

> "That plaintiff recover from the defendant the sum of $10,000 as an award for alimony and for support

of said minor child of the parties, for which amount judgment is hereby rendered in favor of plaintiff against defendant and upon which judgment execution may immediately issue;

That until the further order of the court, and commencing as of November 1, 1952, defendant pay to plaintiffs as alimony the sum of $200.00 per month plus $200.00 per month for the care and support, during his minority, of said minor child of the parties; that as to each such monthly payment the Court expressly denies to itself any reservation of the power to recall or modify any such payment after the same shall have become due and payable in accordance herewith, * * *."

The judgment covered not only the sum of $10,000 but the additional sum of $3,400, representing the net amount of arrearages of alimony.

Joseph has paid to Martha, on current alimony and support money, not one cent since May 9, 1952, and apparently he intends to pay her nothing. He has, though, sent various sums of money to his son.

During the ten months which elapsed between the Mexican decree and the trial of the Ohio divorce proceeding, the Ohio court was wide open to Joseph to assert the defense of the dissolution of the marriage in Mexico. This he failed to do. Indeed, the wife presented a copy of the Mexican decree to the Ohio court and the Ohio court proceeded to grant her a divorce in the face of the Mexican decree. The dissolution of the marriage by the Ohio court in October, 1952, necessarily included an adjudication that the marriage between the parties then existed. Joseph had that fact adjudicated against him in Ohio; and it is now too late for him to relitigate the same issue of fact against Martha in Virginia.

See, *Patterson* v. *Saunders,* 194 Va. 607, 74 S.E. 2d. 204, 208.

It is quite apparent, too, from the record in the instant case, particularly from Joseph's own testimony, that he never acquired a bona-fide domicile in Mexico. This Mexican divorce decree is, therefore, utterly lacking in extra-territorial validity. *Williams* v. *North Carolina,* 325 U.S. 226.

In Ohio, it seems to be well settled that alimony and support money awarded by a court of Ohio in a valid divorce suit cannot be disturbed by any subsequent divorce proceeding in a foreign court in which there is only constructive service. *Melnyk* v. *Melnyk,* 107 N.E. 2d. 549, 550; *Doerr* v. *Forsyte,* 50 Ohio St. 726, 35 N.E. 1055; *McGill* v. *Deming,* 44 Ohio St. 645, 11 N.E. 118.

Appellant apparently concedes the power of the District Court to require him to pay past-due alimony, with the ordinary remedies of a judgment at law. He strenuously insists, however, that the District Court had no power to enter a decree against him for future alimony and particularly to enforce such a decree through its equitable processes acting both *in personam* and *in rem.* We think the District Judge correctly decided: "The monetary decree of this Court will be hereafter enforced through the exercise of its equity powers *in personam* as well as *in rem.*" The District Judge also decreed:

> "This Court will not entertain any application in the future for a modification of any payment nor in any way adjudicate its justice, leaving any change in the original decree as to future payments to the said Court of Common Pleas of Cuyahoga County, Ohio, such change to be thereafter adopted by this Court."

If, as Joseph contends, Martha were here limited to judgments at law, this would compel her to sue on each alimony payment as it became due (certainly a severe hardship) and might afford Joseph too easy an opportunity to evade executions issued on such judgments. The power of a court of equity here seems to be well established by the authorities.

As early as 1858, said Mr. Justice Wayne, in *Barber* v. *Barber,* 21 How. (62 U.S.) 582, 592:

> "We have already shown, by many authorities, that courts of equity have a jurisdiction to interfere to enforce a decree for alimony, and, by cases decided by this court, that the jurisdiction of the courts of equity of the United States is the same as that of England, whence it is derived."

The Barber case was expressly approved in *Sistare* v. *Sistare,* 218 U.S. 1. In *McKeel* v. *McKeel,* 185 Va. 108, 116, 37 S.E. 2d 746, Mr. Justice Eggleston said:

> "Accordingly, we conclude that a decree for alimony and support money, granted by a foreign court, may be established and enforced by and through the equity courts of this State, with the incidental power of enforcement of such a decree by attachment for contempt."

See, also, *Capell* v. *Capell,* 164 Va. 45, 49, 178 S.E. 894, 895. See, too, *Ostrander* v. *Ostrander,* 190 Minn. 547, 252 N.W. 449; *Franchier* v. *Gammill,* 148 Miss. 723, 114 So. 813; *Bruton* v. *Tearle,* 7 Cal. 2d. 48, 59 Pac. 2d. 953.

This brings us to the final question in this case—whether

the District Court had power to include in its decree not only past-due alimony but alimony to become due in the future under the Ohio decree. We think the District Court had this power.

Said Mr. Justice Eggleston in the McKeel case, *supra,* 185 Va. at page 113:

> "But even though the courts of Virginia may not be *compelled* to do so under the full faith and credit clause of the Federal Constitution, upon principles of comity they *may* establish as their own decree a foreign decree for future payments of alimony, with the same force and effect as if it had been entered in Virginia, provided, of course, the foreign decree violates no public policy of Virginia. See *Biewind* v. *Biewind,* 17 Cal. 2d. 108, 109 P. 2d. 701, 132 A.L.R. 1264, and the annotation following it, for a full discussion, and development of the subject.
>
> Since there is nothing in the terms of the Florida decree or in the background of the divorce suit which runs counter to the public policy of the State of Virginia, the Circuit Court of Norfolk county, upon principles of comity, had full power and authority to enter a decree based on the Florida decree requiring the payment of future installments of alimony and support money."

It is clear that there is here a real conflict in the decided cases. The older cases seemingly hold against the application of the decree to payments of alimony to become due in the future, while the later cases incline to the view that such payments may properly be included in the decree. The authorities, *pro and con,* are cited and discussed by Mr. Justice Eggleston in the McKeel case, *supra.*

Apart from purely technical considerations, the older and more rigid rule has little to recommend it. We prefer, as did the District Judge, the modern, liberal rule, which appears to be grounded in reason and flavored with common sense. Stated Mr. Justice Jackson, in his concurring opinion in *Barber* v. *Barber* (1944), 323 U.S. 77, 78: "The purpose of the full faith and credit clause is to lengthen the arm of the State Court and to eliminate state lines as a shelter from judicial proceedings." See, also, *supra,* the Bruton, Ostrander and Franchier cases.

Had Martha sued here in a court of the State of Virginia, clearly, under the McKeel case, *supra,* she would have obtained the relief granted to her in the instant case by the District Judge. In *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 109, Mr. Justice Frankfurter said:

> "In essence, the intent of that decision (*Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64) was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the Federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins,* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

The decree of the District Court is affirmed.

Affirmed.

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HAROLD B. WILLEY, Clerk

In The

Supreme Court Of The United States

OCTOBER TERM, 1954

No. 409

JOSEPH KENT HARRISON, JR.
Petitioner

versus

MARTHA HARRISON,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

Respondent agrees with the statement of petitioner that the petition presents questions of the propriety of the enforcement of future alimony and the use of attachment for contempt by a federal court, but disagrees with the statement that the federal court thereby enters the field of domestic relations.

STATEMENT OF THE CASE

Respondent agrees with the petitioner's statement of the

pleadings and procedure in the lower courts, but feels it necessary to restate the facts more adequately than petitioner has stated them.

OBJECTION TO FILING OF PETITION

At the outset, respondent objects to the filing of the petition for the following three reasons:

1. The petition does not comply with Supreme Court Rule 23 (1) (g), in that the petition does not show the basis for federal jurisdiction in the court of first instance.

2. The petition does not comply with Supreme Court Rule 23 (1) (i), in that it fails to append to the petition a copy of the opinion of the United States District Court for the Eastern District of Virginia.

3. The petition violates Supreme Court Rule 23 (3) in that a separate brief in support of the petition is appended to the petition.

Rule 23 (3) provides in part, as follows:

> ". . . No separate brief in support of a petition for writ of certiorari will be received, and the clerk WILL REFUSE TO FILE ANY PETITION FOR WRIT OF CERTIORARI TO WHICH IS ANNEXED OR APPENDED ANY SUPPORTING BRIEF." (Emphasis added)

In the present case, the petition ends and is signed by counsel at the foot of Page No. 6. On the very next page begins, by petitioner's own designation, his *"Brief in Support of Petition"*. Here is a clear violation of Rule 23 (3) and the filing of the petition cannot be allowed in the face of it. The

integrity of the Court's own rule, couched in the plainest of mandatory language, is at stake.

Respondent submits that the petition ought not to be filed nor considered by the Court because of the three serious defects in the petition.

FACTS

A complete restatement of the facts is necessary, the facts so stated being taken almost entirely from the mouth of petitioner himself, mostly from his sworn deposition and partly from his admissions in the pleadings.

Respondent, Martha Harrison, and petitioner, Joseph Kent Harrison, Jr., were married in Middletown, Ohio, on September 11, 1937. Thereafter, they lived together in Shaker Heights, a nice, residential suburb of Cleveland, Ohio (R. 18). One child, a boy named Joseph Kent Harrison, III, was born of the marriage, who is now fourteen years old, his custody having been awarded to his mother by the Ohio divorce court.

In 1950, in Cleveland, Joseph met Marjorie Malbon Burton, of Norfolk, Virginia, at a business meeting. Joseph was then working for Armco Steel Company, of Cleveland, his annual pay being about $9,200. Marjorie Burton was the owner of 60% of the stock of the Rusco Window Corporation, of Norfolk, of which she was also the secretary and treasurer (R. 16, 22). After their first meeting, Joseph saw her again at other meetings (R. 13), telephoned her (R. 13), saw her at a cocktail party in Cleveland (R. 13), and wrote her letters (R. 14). On another occasion, he visited for the week-end in the home of a mutual friend in Richmond, Virginia, a home where Marjorie may have also spent the week-end at the same time

and where there was discussed the possibility of petitioner's leaving Cleveland to come to work in Norfolk, where Marjorie was (R. 15).

In January, 1951, Joseph's domestic difficulties with Martha, the respondent, came to a head (R. 16). He did not want to continue to live with her (R. 17), she having attempted to discuss reconciliation with him through her attorney, Mr. Bovington (R. 16, 17). She instituted a divorce suit against him, in which he was personally served with process, and he retained a lawyer to represent him, making a temporary alimony and support money agreement and appearing by counsel in the divorce suit in the filing of the agreement (R. 17, 18).

Shortly thereafter, Joseph left his $9,200 job in Cleveland to go to work for $6,000 a year for the Norfolk company of which Marjorie Malbon Burton was a 60% stockholder and secretary-treasurer, she having a hand in procuring his change of employment (R. 13, 15). This cut in salary was taken despite the fact that he had experienced trouble supporting his wife and child on his previous pay (R. 18). Upon coming to work for his friend Marjorie's company, he took up living quarters at Virginia Beach, just a half or three-quarters of a mile away from her home (R. 18, 19). He thereupon began to see her from one to 5 nights a week, averaging four nights a week, for driving, dancing, eating dinner, or talking (R. 19). They were "going together", so to speak, appearing together at cocktail parties (R. 19, 20).

Meanwhile, Joseph had tried unsuccessfully to have his Cleveland attorney persuade his wife to let the Ohio divorce go through in "its normal course rather than have it continued as she had done a number of times" (R. 21). Indeed, his Cleveland lawyer had cited a case to him of a Kentucky man who "had been able to get out of the country and get a quick divorce" (R. 20, 21). So Joseph, in early November, 1951, de-

parted from Norfolk for Mexico, on full pay from his Norfolk employer (R. 21, 23, 24), was joined there in less than two weeks by Marjorie (R. 22, 23), stayed there about six weeks, procured a supposed Mexican decree of divorce (not based on personal service of process), went through a supposed marriage ceremony in Mexico with Marjorie three days later (R. 24), and returned to Norfolk within a few days thereafter.

The six-weeks' visit to Mexico was on a tourist passport (R. 22), petitioner staying as well in Texas and New Mexico from time to time (R. 23), his only quarters being tourist courts and hotels (R. 23). The purpose of the trip was "ostensibly just to see Mexico" (R. 26), with the additional hope of finding employment, hope which was completely unfulfilled. Joseph never made up his mind to give up his Virginia domicile and not to return to Norfolk (R. 25). Indeed, far from deciding to remain permanently in Mexico, he contracted dysentery immediately on arrival and decided then that he could not take the Mexican diet (R. 26). When he went through a Mexican marriage ceremony with Marjorie, three days after the supposed Mexican divorce, his application for a marriage license listed his *domicilio* as Virginia Beach, Virginia (Exhibit 1, R. 11) and within ten days he was back in Virginia with his supposed bride.

During this period of time, the Ohio divorce suit had been pending unadjudicated. Thereafter, respondent went ahead with the Ohio divorce and was awarded a decree of divorce in her favor wherein the defendant (petitioner in this court) was found "guilty of gross neglect of duty and extreme cruelty towards plaintiff." The decree also contained the following order:

> "That plaintiff recover from the defendant the sum of $10,000 as an award for alimony and for support of said minor child of the parties, for which amount judgment is

hereby rendered in favor of plaintiff against defendant and upon which judgment execution may immediately issue;

"That until the further order of this court, and commencing as of November 1, 1952, defendant pay to plaintiff as alimony the sum of $200.00 per month plus $200.00 per month for the care and support, during his minority, of said minor child of the parties; that as to each such monthly payment the Court expressly denies to itself any reservation of the power to recall or modify any such payment after the same shall have become due and payable in accordance herewith, . . ."

Petitioner has paid to respondent on current alimony and support money, not one cent since May 9, 1952, and intends to pay her nothing (R. 12), though he has sent various sums to the boy.

ARGUMENT

Respondent submits that the petition for writ of certiorari should fail for the following three reasons:

I. *There is no question of domestic relations involved in this case.*

II. *The petition presents no basis for review on certiorari.*

III. *The decision of the lower courts is plainly right.*

I

There Is No Question Of Domestic Relations Involved In This Case.

Petitioner says that there are two questions presented by his

petition, both implying that a federal court has entered the field of domestic relations. Although the petition has failed to state it, the basis of federal jurisdiction in this case is diversity of citizenship and a money claim for more than $3,000.00. This case involves only the enforcement in Virginia of a money decree of an Ohio Court. The amount of money involved being more than $3,000.00 and the parties being of diverse citizenship, there is a perfect case of federal jurisdiction, which petitioner has never questioned.

Respondent readily concedes that federal courts have no jurisdiction over the subject of divorce, the *awarding* of alimony, nor the field of domestic relations in general. On the other hand, it has been well settled since *Barber* v. *Barber*, 21 How. 582 (1858), that federal courts do have jurisdiction to enforce alimony already awarded, if the jurisdictional amount and diversity of citizenship exist. The District Court memorandum opinion, not printed in the petition, effectively disposes of the point by the following language:

> "The Court will, of course, not entertain any application in the future for a modification of the installments, or in any way adjudicate the justness of such installments for the future, for that is a question of domestic or parental obligation of which this Court has no jurisdiction. Any change in the original decree as to future payments must come from the Ohio Court and such changes will then be adopted by this Court."

There is no need for this Court, then, to be misled by petitioner's claim that this case embroils a federal court in the prohibited field of domestic relations. This is a money case, seeking money only and not an adjudication of, nor change in, the status of any member of the family nor any *award* based on family relationship.

II

The Petition Presents No Basis For Review On Certiorari

Petition attempts to show a basis for review on a supposed conflict between this decision of the Fourth Circuit and a line of decisions of the Circuit Court of Appeals of the District of Columbia. This apparent conflict is illusory only, and not real.

It is true that the Court of Appeals for the District of Columbia, together with the courts of New Jersey and Massachusetts, has treated a foreign alimony decree as a mere debt, entitled to enforcement only by execution and only for past-due alimony. The present case, however, arose in Virginia and is governed by Virginia Law. The federal court in Virginia rightly decided to follow Virginia Law under the doctrine of *Erie Railroad* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 89, L.Ed. 2079. As is said in the latter case, at page 109:

> ". . . In essence, the intent of the decision (Erie R. Co. v. Tompkins) was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the Federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

Thus, it is clear that the present case creates no conflict be-

tween decisions of Circuit Courts of Appeals. The conflict is between the Virginia Rule and the District of Columbia Rule.

Petitioner claims also, as a supposed basis of review, that the present decision conflicts with the decision of this court in *Barber* v. *Barber, supra.* It is true that the Barber case does contain a dictum to the effect that a foreign alimony decree may be enforced only to the extent of what is due, but that was dictum because the wife in that case sought only past-due alimony.

The real heart and soul of Barber is that enforcement of alimony lies in equity, not in law. That issue was squarely presented and squarely decided. This Court has never, since 1858, questioned the rule that such matters lie in equity, but on the contrary has affirmed that principle in the case of *Sistare* v. *Sistare,* 218 U.S. 1, 54 L.Ed. 905 (1909). Petitioner's attempt to give the Ohio wife in this case only partial relief must fail in the face of that principle. One of the basic maxims of equity is: "A court of equity must do justice completely, not by halves".

Petitioner would have this court decree that the Ohio wife in a federal equity court can recover only past due alimony and support money and that enforcement should be restricted to the ordinary remedies of the judgment at law. That is not the meaning of the Barber case. Equitable jurisdiction, having once attached, carries through to do complete justice between the parties. There has never been, nor ever should be, a decision of this Court to the contrary.

III

The Decision Of The Lower Courts Is Plainly Right.

Respondent's right to alimony and support money is governed by Virginia law, as laid down in *McKeel* v. *McKeel,* 185

Va. 108, 37 S.E. (2nd) 746 (1947). The District Court and the Court of Appeals in following the rule of McKeel have rendered full justice and are plainly right. As is said in the McKeel case:

> "We agree with the reasoning in these latter cases, which, in our opinion, is sound and in line with the public policy of this State. It is elementary that a husband's duty to support his wife and children is not merely contractual, but is one in which the public has a vital interest. *Capell* v. *Capell*, 164 Va. 45, 49, 178 S.E. 894, 895. The obligation, wherever incurred, is the same and cannot be avoided or lessened by the simple device of crossing a State line. Since the appellant has become a resident of Virginia, the public policy of this State now demands that his obligation be performed as fully as if it had been incurred here in the first instance.
>
> "Accordingly, we conclude that a decree for alimony and support money, granted by a foreign court, may be established and enforced by and through the equity courts of this State, with the incidental power of enforcement of such a decree by attachment for contempt."

And in regard to future alimony, the following was said at page 113:

> "But even though the courts of Virginia may not be compelled to do so under the full faith and credit clause of the Federal Constitution, upon principles of comity they may establish as their own decree a foreign decree for future payments of alimony, with the same force and effect as if it had been entered in Virginia, provided, of course, the foreign decree violates no public policy of Virginia. See Biewend v. Biewend, 17 Cal. (2d) 108, 109 P. (2d) 701, 132 A.L.R. 1264, and the annotation

following it, for a full discussion, and development of the subject.

"Since there is nothing in the terms of the Florida decree or in the background of the divorce suit which runs counter to the public policy of the State of Virginia, the Circuit Court of Norfolk county, upon principles of comity, had full power and authority to enter a decree based on the Florida decree requiring the payment of future installments of alimony and support money."

Nothing more need be said on this point beyond adverting to the opinions of the Court of Appeals and the District Court in this case.

CONCLUSION

Respondent respectfully submits that the petition for writ of certiorari is fatally defective in three particulars, and should never have been allowed to be filed. No basis for review by this Court has been shown, and the decision of the lower courts is plainly right. Wherefore respondent prays that the petition be denied with costs against petitioner, including a reasonable fee to respondent's counsel for services in this Court.

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